



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2003

Mr. Jason Martinson
Open Records Coordinator
Texas Parks & Wildlife
4200 Smith School Road
Austin, Texas 78744-3291

OR2003-7010

Dear Mr. Martinson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 188792.

The Texas Parks and Wildlife Department (the "Department") received a request for copies of the Statement of Qualifications submitted by Shiner, Moseley & Associates ("SMA") and Coast & Harbor Engineering ("CHE") in response to a Request for Qualifications for Project Number 101375, "Goose Island Shoreline Stabilization and Restoration of Adjacent Habitats in Aransas Bay." You state, and provide supporting documentation showing, that the Department notified CHE, an interested third party, of the Department's receipt of the request and of CHE's right to submit arguments to this office explaining why its information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We reviewed the information you submitted and considered the issues.

Initially, we note that you did not submit information responsive to the portion of the request for a Statement of Qualifications submitted by SMA, nor do you inform us that such information has been released to the requestor. Further, you have provided no documentation showing that you notified SMA of the request and of their right to submit arguments to this office. *See* Gov't Code § 552.305. Thus, we assume that if such

information exists, then the Department has released it to the requestor. If not, then the Department must release this information to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, we address the Department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general: (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and (4) a copy of the specific information requested or representative samples of it, if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e).

You state that the Department received the written request for information on May 27, 2003. Thus, the Department should have submitted a request for an attorney general decision no later than June 10, 2003 and forwarded all other required documentation to this office by June 17, 2003. However, your letter requesting a decision from our office and your supporting documentation has a postmark date of July 30, 2003. Consequently, we conclude that the Department failed to comply with the procedural requirements of section 552.301 in requesting this decision.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. A governmental body must release information presumed public under section 552.302, unless it demonstrates a compelling reason to withhold the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists when some other source of law makes the information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because the Department indicates that release of the submitted information may implicate third party interests, which can provide a compelling reason to overcome the presumption of openness, we will address this issue.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't

Code § 552.305(d)(2)(B). As of the date of this letter, CHE has not submitted to this office its reasons explaining why the Department should not release its information. Therefore, we have no basis from which to conclude that CHE has a protected proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the Department may not withhold the submitted information under section 552.110 of the Government Code. Accordingly, as you assert no other exceptions for our consideration, the Department must release the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

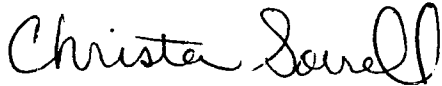
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 188792

Enc: Submitted documents

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